A

FEW SUGGESTIONS

UPON

THE PERSONAL LIBERTY LAW

AND

"SECESSION"

(SO CALLED).

IN A LETTER TO A FRIEND.

(By Benjamin F. Thomas.)

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LETTER.

My dear Sir, — In compliance with your suggestion, I venture to put in the form of a letter a few thoughts upon the subject of our conversation a few days since. I must write with the pressure of other duties upon me; but I will not say, without reflection. No thoughtful man, at a time like this, could have failed to reflect upon the interests of his country, and the duty he owed to it. For brevity's sake, I must state conclusions rather than arguments. You wished for my opinions, and I give them frankly.

The first question which honest men are now asking themselves is, What may fairly be required of us? and the second is, What may we fairly require of others?

This much may be fairly required of us, citizens of Massachusetts, — that we should be thoroughly loyal to the Union, if we mean to preserve it; and faithful to the Constitution, if we mean to uphold and enforce it. We cannot, in common honesty, insist that others shall do what we are not ready to do ourselves. In this great controversy, which has already assumed the form

of civil war, there is but one issue to be settled; and that is, whether the Constitution and laws of the United States are, and are to be, the supreme law of the land. Do we mean to accept that issue, and abide by it, now and hereafter? That is a plain question, to which we are bound in all frankness to give a plain answer. If we say, "Yes, God helping us, we do," then our obvious duty, I submit, is to examine ourselves, and, if we have been in error, to correct it. If there are laws upon our statute-book, which, in the letter or *the spirit*, conflict with the Constitution and laws of the Union, we ought promptly to repeal them.

A word as to the fair mode of looking at these statutes; for every thing depends upon the way of putting things. It is not to see whether, by any possible ingenuity of construction, they can be held not to violate the letter of the Constitution or laws of the United States. There is a mode of testing the constitutionality of a statute which is offensive to good sense. It is to overlook its obvious design in the search of some remote possible contingency in which it may be valid; to emasculate a statute in order to give it validity, take out the very breath of its life, and then say the body is very quiet and harmless. Judicial tribunals must sometimes measure the exact legal force of a penal statute; weigh it in scales which the weight of a feather may turn. But these statutes touch the domain of public law, affect the interests of States; and their validity will be settled by statesmen and jurists and the people at large, not by any refinements of construction, but

upon their general and obvious scope, purpose, and spirit.

A single suggestion as to the proper time for revising these laws. If it is right to revise them, now is the time. "Now" is always the seasonable time to do right. If the revision can ever do any good, it is now. The intimation, that we shall be thought to have acted under a threat, has no foundation in fact; nor is it of the least moment if it had. The man who fears to do right lest his motives be misconstrued becomes a coward to avoid being thought one, and loses his self-respect to win the respect of others.

You have known, my dear sir, that I fully sympathize with the people of Massachusetts in their just and righteous aversion to the Fugitive-slave Law of 1850. It was industriously meant to be offensive. I have never seen the man in this Commonwealth, who, whatever his opinion of its validity, did not regard it as unnecessarily harsh and rigorous. It fails of effect from its great severity. Nay, I should go further, and should not hesitate to say, were I not concluded by judicial authority, that the law, in many of its essential features, is in conflict with the Constitution of the United States. Never has a constitutional provision been so tortured by judicial construction as that clause in relation to fugitives from service. But the law has been held valid by those who had the rightful power to pass upon its validity; and, as a good citizen, I must bow to its authority. My oath does not restrict me to the support of the Constitution "as I understand it."

With these feelings and convictions in relation to the Fugitive-slave Law of 1850, I have, nevertheless, always been of the opinion, that every attempt to soften the rigor of the law, to supply its defects, to relieve its injustice, or to obstruct its operation, by State legislation, would be utterly vain and futile. It is only kicking against the pricks. The wise and prudent thing would have been, to have waited until we had power to soften the rigors of the law on the spot of its origin, in the place of its birth. In that effort we should have had the aid of wise and good men in all parts of the country.

We are held in double trust. We are not only citizens of Massachusetts, but of the United States. The people framed the Constitutions of both.

The government of the United States acts, not upon the State, nor upon us as citizens of the State, but upon us as citizens of the United States. The Constitution of the United States, and the laws made under it, are *our* supreme law, — the supreme law of the land; and the judges in every State are bound by them, "any thing in the constitution or laws of any State to the contrary notwithstanding." No human ingenuity can contrive a State law or ordinance which can defeat, or fairly shield us from, a law of the United States, which the courts of the United States have declared to be valid. I speak not of what may be done by indirection, but of the fair, legitimate effect of the State law. The greater its apparent strength, the greater would be its

real weakness. These are plain, and, to the legal mind, obvious truths.

In the light of them, let us look at the statutes of which complaint is made. I have not the slightest disposition to exaggerate their faults. I cordially respect the spirit of humanity and the love of the old common-law muniments of freedom which characterize them.

There is no doubt, also, that, in a legal view, very undue importance has been attached to them by worthy citizens of other States as well as our own.

In considering these statutes, statesmen even seem to have lost sight of the distribution of powers under our written constitutions and frames of government, and the relation of the judicial to the legislative department. An act of Parliament is a law. An act of our Legislature may or may not be a law. It is not a law if held to be invalid by the judicial department; and it must be so held if in conflict with the Constitution of the State, or the Constitution and laws of the United States.

Now, there never has been a day or an hour in Massachusetts, when the arrest of any fugitive from service has been obstructed by any LAW of Massachusetts; that is, by any statute recognized and enforced by its judicial tribunals.

May I not be pardoned for saying that there is not a State in the Union whose judiciary has been more faithful to the Constitution of the United States than our own? — upholding the laws made under that Con-

stitution, when God only knew how bitter was the struggle between the man and the magistrate. By no law or judicial decree of the Commonwealth have the rights of any one master, in any one case, been in the least degree impaired. Nor could they be to-day, unless we suppose (what the history of the State does not authorize us to suppose) that the judicial department will be false to its duty. I am speaking now of the legal, and not the moral, aspect of the case.

Nor can the Commonwealth be justly said to have been guilty of any breach of the national "compact," if that word can be fitly applied to the Constitution of the United States. There clearly could be no breach of the compact by an act of the Legislature which was not upheld by its judicial and supported by its executive department.

To say that the State of Massachusetts has, by her legislation, broken the Constitution of the United States, is, with great deference, a contradiction in terms. As matter of law, the thing is impossible; for a conflict of the statute of a State with the Constitution or laws of the United States brings the statute directly under the cognizance of the Federal judiciary, by whose action it is at once shorn of its power.

The word "compact" is not applicable to the Constitution of the United States. The Constitution is not a compact between the States, or the people of the several States. It is a *frame of government*, ordained and established by "the people of the United States;"

of limited sphere it may be, but in that sphere *supreme.* The statute passed by a State Legislature in conflict with that Constitution is itself broken by the collision, and not the Constitution, — the hammer, and not the anvil.

This is not, my dear sir, mere verbal criticism, but matter of vital principle; for it is, as you well know, upon the double ground that the Constitution *is* a *compact* which a State is capable in law of breaking, and that the statutes of Massachusetts and of other Free States are breaches of the compact, that Southern statesmen attempt to justify secession. That Constitution is not a fragile compact, but an infrangible government. If such statutes exist, they are only futile attempts to do what, by law or ordinance, a State cannot do, — abrogate or impair a law paramount to its own. The moment the conflict is seen, the statute disappears. There is nothing left but written or printed words, signifying nothing, effecting nothing.

If these views are sound, the retention upon our statute-book of any provisions which tend to obstruct or defeat the Fugitive-slave Law, or mitigate its rigors, is an idle ceremony. If they cannot do this, they are useless; if they can do it, they are void. Before they can do it, you must omit from the Constitution of the United States, which you print with your statutes, these solemn provisions: —

"This Constitution and the laws of the United States, which shall be made in pursuance thereof . . .

shall be the supreme law of the land; and the judges of every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

"The judicial power (of the United States) shall extend to all cases, in law or equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

In the examination of our statutes which have relation to fugitives from service, I have found but one provision, which, as matter of strict law, appears to me to be in conflict with the Constitution and laws of the United States. That is in the 19th, 20th, and 21st sects. of chap. 144 of the General Statutes. If, by the fair construction of these sections, the court to whom a writ of habeas corpus is returnable, must or may, when it appears by the return that the person whose restraint is in question is claimed as a fugitive from service, proceed to try the issues of fact, although it also appears that the prisoner was in the custody of the marshal of the United States or his deputy, under a warrant or certificate duly issued, the validity of the provisions cannot, in my judgment, be maintained; and this, I think, is the fair, though, I will not say, necessary construction of these sections. The ground upon which they may perhaps be maintained is, that the custody of the marshal, under the warrant, constitutes an implied exception to the statute. But, if this con-

struction were adopted, it is obvious the law would be of little practical value to the fugitive. It is made valid by taking from it its effective force in the only cases likely to arise.

The object of these provisions is to give to the alleged fugitive from service the trial by jury, which is not secured by the law of the United States. If the provision was valid and effectual, I frankly say, I would not repeal it: I would rather imbed it in the Constitution of the Commonwealth. But it is ineffectual under the law as decided. No judge could enforce it, so as to take the prisoner from the custody of the marshal, and try the issues of fact, who is faithful to his duty, and the laws of which he is the servant.

I cannot assent to the construction of the sixty-second section of this law, which holds that a person honestly claiming his slave may be subjected to an ignominious punishment by a misapprehension or mistake of his rights, or a failure to maintain them. Applying to this section the settled rules of construction for criminal or penal statutes, such result, I respectfully submit, cannot be reached. It is the removal of a person from the Commonwealth who is not held to labor or service, on "*the pretence*" that he is so held to labor or service, or "*with the intent to subject him*" to labor or service not due, that is made an offence under the statute. It is the holding-out of a false claim, a pretence, and the *intent* to subject one to service not due, which the statute punishes. Yet as jurists, for whom we all have

profound respect, seem to think the statute susceptible of another construction, and as the meaning of all penal statutes should be as free from doubt as possible, the section should be so amended as to render it certain that it applies only to claims made in bad faith, falsely made.

Nor do I understand, that, under the sixty-fourth and sixty-fifth sections of this statute, the volunteer militia of the Commonwealth cannot be used to protect the officers of the United States, in the streets of our towns and cities, from lawless violence. The volunteer militia are not to act in any manner in "the seizure, detention, or rendition," of a fugitive from service; but they may do, nay, more, must do, under the statutes, exactly what they did in the Burns case, — preserve, at all hazards, the public peace.

Under the provisions of chap. 164 of the General Statutes, the militia may be called out by the mayor, and other officers therein designated, to protect the peace of the city, in case of any riot, actual or threatened; and, in such event, officers and soldiers are bound to obey, and are exempted from any penalty for obedience (chap. 164, Ela *vs.* Smith, 5 Gray, 121). I see no ground for supposing that the statutes have modified the law, stated so clearly in this case by the present Chief-Justice of the Commonwealth.

But, in giving the legal construction to these sections, are they not divested of their power, and left of little practical value? Are not the provisions of the Personal-liberty Bill of 1855 which remain, so

shorn of their strength, of their legal capacity for good or evil, that the most sensible thing that can be done is simply to repeal them? As they stand, and must be construed, they mock the alleged fugitive with a false show of protection, with the shadow of a shield; keeping the word of promise to his ear, but breaking it to his hope.

The best thing that can be done with the remains of the statute of 1855 is to lay them upon the altar of the country. It does not require a great sacrifice; and it is *our* country.

Incapable of substantial legal good, they do much political and moral evil.

They are not, in their spirit, loyal to the Union. They tend to bring into conflict our relations to the State and the United States, to which we are alike bound, and must be alike faithful.

They are unjust to the citizens of the United States, who feel that they must obey the laws of the United States, and that the State cannot fairly subject them to any disability or distrust even for such fidelity.

They disturb the friendly relations which would otherwise exist between us and the friends of the Union in the Southern States.

They strengthen the hands, they encourage the hearts, of the enemies of the Union. They are made the occasion, if not the cause, the pretence, if not the reason, for the attempts to sever that Union. They furnish a pretext, a seeming apology, for treason.

The ground of objection to these statutes is their

apparent design to obstruct a law of the United States, — an iron law, it may be, but a *law*. Their real and humane purpose was to give to the rights of the feeble and humble the protection which the law of the United States failed to give. They can legally effect neither the apparent design nor their real purpose. And the difficulty, in my judgment, is intrinsic, and results from the fact, that a law of the United States, held to be valid by the judiciary of the United States, is the supreme law of the courts of Massachusetts; and no State law can either get over it or around it.

The only place to seek the modification of the Fugitive-slave Law is on the floor of Congress; and we need not despair of such a result. The just and reasonable modifications to be effected are, that the alleged fugitive shall, from the time of his arrest, be in the custody of the *courts* of the United States, both in the State where he is seized and that to which he is returned; that, before he shall be delivered into the custody of the claimant, he shall have the right to trial by jury, freely and without purchase, under rules of evidence to be prescribed by Congress; the most essential of which would be the presumption of freedom, and the right to meet the witnesses against him face to face.

Having done what may fairly be required of us, we may inquire what may fairly be required of others.

I have already stated the issue before the country. It must be settled now. Let us not deceive ourselves.

Let us not disguise the real dangers before us. If secession is insisted on, civil war is inevitable.

We were Colonies of Great Britain, — separate, distinct, jealous Colonies. Under the oppression of the mother-country, we grew and ripened into one national life. By the declaration of independence, the Colonies became, not separate and distinct nations, but one nation. Under the Continental Congress, the Revolutionary Government, even under the confederation, the great attributes of sovereignty were in the *United* States, thirteen States, one nation, — *E pluribus unum.*

"To all general purposes" (says Mr. Jay in the "Federalist"), "we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection. As a nation, we have made peace and war; as a nation, we have vanquished our common enemies; as a nation, we have formed alliances and made treaties, and entered into various compacts and conventions with foreign States" ("Federalist," No. 2).

The "people of the United States, to form a more *perfect union*, to establish justice, insure domestic tranquillity, provide for the *common* defence, promote the *general* welfare, and secure the blessings of liberty to themselves and their posterity," ordained and established the Constitution of the United States. They established a government, with no provision for its termination, without limitation of time, for themselves and their *posterity*, — a government clothed with spe-

cific powers, but in its sphere supreme. There is no clause or word in the Constitution which looks to separation. The government established by the Constitution is a perpetual government, with provisions for its amendment, none for its destruction; with a door for new States to come in, but none for old ones to go out.

You may recollect, that in the Convention of the people of New York, called to act upon the adoption of the Constitution, Mr. Lansing moved to annex to the ratification a reservation of the right of New York to withdraw from the Union within a certain number of years, if the amendments proposed by the New-York Convention were not adopted. Hamilton declared the reservation was inconsistent with the Constitution, and would not be a ratification. He wrote to Madison for his opinion upon the possibility of the State being received on that plan. Madison wrote, that the adoption, with reservation of a right to withdraw, would not make New York a member of the Union, and that she could not be received on that basis. "The Constitution requires an adoption *in toto* and *for ever*."

South Carolina has, it is said, seceded. It is quite plain, from the discussions of the Convention, that there is no man in her borders that knows what secession means, or what South Carolina is after secession. If she is the nation of South Carolina, can any one tell us when and by what process she became so? She had not, before the Constitution was

adopted, the attributes of a nation. Has she acquired them while under the Constitution, while every strictly national function has been exercised by a government paramount to her own? The people of this country are not to be beguiled by words: they will look at things. Secession has *no legal meaning.* It is but another name for rebellion or revolution: whether rebellion or revolution, must depend upon its success or failure. If it be any thing, it is but a process by which a State may forego all the privileges of the Union, leaving her people still liable to all its obligations and duties.

No provision of the Constitution, no law of the United States, is abrogated or affected by the "Ordinance" of South Carolina. No citizen of the United States in South Carolina is exempted from any the least of his duties under the Constitution and laws of the United States. The Constitution and laws of the United States act directly upon him, and not through the State upon him. They are the supreme law; and the act of the State, ordinance, or statute, which conflicts with that supreme law, shrivels into a nullity. To attempt to defeat it by a resolution is folly. To attempt to defeat the National Government by organized resistance, by force of arms, is treason. To kill an officer of the United States when in the discharge of his legal duty is murder. This is plain language: we cannot afford to use any other. Secession is rebellion, without the manliness that should attend it. It is an attempt to get by legal craft

ment, and the infinite blessings it secures to the country, without a struggle, is the saddest of mistakes. This government is a great and sacred trust. We shall be false to country, to freedom, to humanity, if we consent to give it up till the struggle is seen to be utterly hopeless.

Very truly your friend,

BENJ. F. THOMAS.

Boston, Jan. 1, 1861.